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No. 08-310

In The
# Supreme Court of the United States

POLAR TANKERS, INC.,

*Petitioner,*

v.

CITY OF VALDEZ,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Alaska**

## BRIEF OF TROPICAL SHIPPING AND CONSTRUCTION COMPANY LIMITED AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JONATHAN F. MITCHELL
*Counsel of Record*
3301 Fairfax Drive
Arlington, VA 22201
(703) 993-8848

PAUL C. GRACEY, JR.
NICOR INC./TROPICAL SHIPPING AND CONSTRUCTION CO. LTD.
1844 Ferry Road
Naperville, IL 60563
(630) 388-2750

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Whether a municipal personal property tax that falls exclusively on large vessels using the municipality's harbor violates the Tonnage Clause of the Constitution, Art. I, § 10, Cl. 3.

2. Whether a municipal personal property tax that is apportioned to reach the value of property with an out-of-state domicile for periods when the property is on the high seas or otherwise outside the taxing jurisdiction of any State violates the Commerce and Due Process Clauses of the Constitution.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

INTEREST OF *AMICUS* ..... 1

STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 5

ARGUMENT ..... 7

I. States cannot escape the Duty of Tonnage Clause by simply recalibrating such duties as a function of the vessel's assessed market value ..... 7

A. States may impose charges for services that they provide to vessels, but they may not charge vessels for the mere privilege of using their ports ..... 13

B. States may levy generally applicable personal property taxes on vessels in their ports, but the Duty of Tonnage Clause forbids assessments targeted at vessels as instrumentalities of commerce or navigation ..... 16

II. The City of Valdez "personal property" tax is a duty of tonnage masquerading as a property tax ..... 21

A. The City of Valdez has violated the Tonnage Clause by targeting its personal property tax at ships and vessels in its ports and exempting all other personal property from its scope ..... 22

TABLE OF CONTENTS – Continued

Page

B. The City of Valdez has violated the Tonnage Clause by adopting an apportionment formula that bears no relation to the benefits and municipal services it provides to vessel owners .... 25

CONCLUSION ..... 27

TABLE OF AUTHORITIES

Page

CASES

*Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).....6, 7, 12

*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997).....8

*Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577 (1874).....11, 14

*Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935).....*passim*

*Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824).....8

*Hays* v. *Pac. Mail S.S. Co.*, 58 U.S. (17 How.) 596 (1855).....18

*Huse* v. *Glover*, 119 U.S. 543 (1886).....16

*Inman S.S. Co.* v. *Tinker*, 94 U.S. 238 (1876).....13, 15

*Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979).....18

*Norris* v. *City of Boston*, 48 U.S. (7 How.) 283 (1849).....9

*Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877).....15

*Ring* v. *Arizona*, 536 U.S. 584 (2002).....20

*State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204 (1870).....*passim*

*Steamship Co.* v. *Portwardens*, 73 U.S. (6 Wall.) 31 (1867).....*passim*

TABLE OF AUTHORITIES – Continued

Page

*Transp. Co.* v. *Parkersburg*, 107 U.S. 691 (1883).....15

*Transp. Co.* v. *Wheeling*, 99 U.S. 273 (1878).....16, 17, 18, 21, 23

*Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664 (1970).....24

*Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123 (1869).....8

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 10, Cl. 2.....8

U.S. Const. Art. I, § 10, Cl. 3.....3, 4, 5, 7

MISCELLANEOUS

William Henry Burroughs, *A Treatise on the Law of Taxation* (1877).....8

## INTEREST OF AMICUS

*Amicus curiae* Tropical Shipping and Construction Company Limited is a shipping company whose vessels use United States ports. *Amicus curiae* has an interest in ensuring that state and municipal shipping taxes remain within the boundaries prescribed in the Duty of Tonnage Clause and in this Court's jurisprudence.[1]

## STATEMENT OF THE CASE

In 1999, the City of Valdez enacted Ordinance No. 99-17, which imposes a "personal property" tax on certain vessels over 95 feet in length. Pet. App. 45a. The Ordinance, however, exempts commercial-fishing vessels and "all other personal property" from this exaction. *Id.* at 45a, 48a. It also exempts vessels that dock exclusively at the Valdez Container Terminal, a city-owned dock that has no crude oil storage facilities and is not used for transporting crude oil. *Id.* at 45a. As a result, Valdez's personal property tax falls

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

primarily on oil tankers that transport Alaska's crude oil exports to out-of-state residents. *Id.* at 40a.[2]

In addition, most of these vessels are domiciled in other States and, as mobile property, spend much of the year on the high seas or in ports outside of Valdez. Yet Valdez fails to apportion its property tax in accordance with the amount of time that the vessels spend in the city's ports. Instead, Valdez employs a "port-day" formula, which divides the number of days a vessel spends in Valdez by the number of days spent in all ports in a given year. The City then multiplies this fraction with the total assessed value of the vessel, and levies a 20 mill (2%) tax on that amount. Pet. App. 55a-56a. Under this formula, a vessel that spends 4 days in Valdez ports, 2 days in another jurisdiction's port, and 359 days on the high seas will pay a *higher* tax rate than a vessel that spends 100 days in Valdez, 200 days in other ports, and 65 days on the high seas. This "port-day" formula upends any connection between the amount of the assessed tax and the public services, such as police and fire protection, that the City provides to the vessel's owners.

The state trial court initially held that this vessel tax violated the Duty of Tonnage Clause, which provides that "No State shall, without the Consent of

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[2] The state trial court noted that in 2000, the City of Valdez assessed its personal property tax on 28 vessels; 24 of these were oil tankers. See Pet. App. 40a n.2. Valdez also collected tax that year from three tugboats and one passenger cruise ship. J.A. 53.

Congress, lay any Duty of Tonnage . . . " U.S. Const. Art. I, § 10, Cl. 3. Even though the City had never linked the *amount* of tax owed with the vessels' "tonnage" (*i.e.*, weight or carrying capacity), the trial court relied on this Court's decision in *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265 (1935), which declared that a "Duty of Tonnage" includes *any* tax or duty "for the privilege of entering, trading in or lying in a port" – "regardless of [its] name or form, *and even though not measured by the tonnage of the vessel*." *Id.* at 265-266 (emphasis added). By contrast, the Tonnage Clause *permits* States to assess charges "for services rendered to and enjoyed by the vessel, such as pilotage, or wharfage." *Id.* at 266 (citations omitted).[3] Applying this framework, the court found that the vessel tax violated the Tonnage Clause because the City was not attempting to collect compensation for specific services that it provided to the vessels' owners. Pet. App. 42a-43a. Rather, the vessel tax was a means to raise general revenues that the City wanted to replenish its declining tax base and fund projects such as school and hospital construction;[4] in other words, it was a tax

[3] See also *id.* at 265 (stating that Tonnage Clause allows "fees or charges by authority of a state for services facilitating commerce, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage, and the like").

[4] See, *e.g.,* Pet. App. at 53a-54a (quoting City of Valdez Resolution No. 00-15, which bemoans the city's declining tax revenues and mentions the need to build a new hospital and a new junior high school).

imposed for the mere privilege of using the City's ports.

Two days later, however, the trial court changed its mind and decided that the Vessel Tax was not a "Duty of Tonnage" under Article I, § 10, Cl. 3. It noted that the City of Valdez provided the vessels with "various benefits or municipal services" that were funded by general tax revenues. Pet. App. 29a. And that, in the trial court's view, was enough to uphold the vessel tax as a "charge for services rendered to and enjoyed by the vessel," rather than an unconstitutional "Duty of Tonnage." The court admitted that it had "misunderstood the taxpayers to be arguing that *no* public services of the City which are paid for by the tax were available to the vessels." Pet. App. 29a (emphasis added). The trial court was also untroubled by its earlier observation that the City had "targeted" this personal property tax exclusively on vessels in the City's ports. The court explained: "The failure of the City to tax more property does not make its taxation of all property of this class an unconstitutional tonnage tax." Pet. App. 30a. The trial court did, however, conclude that the vessel tax violated the Due Process and Commerce Clauses. *Id.* at 23a.

On appeal, the Alaska Supreme Court also rejected the Petitioner's contention that the vessel tax violated the Tonnage Clause. The state supreme court held that a "fairly apportioned property tax" is not a forbidden "Duty of Tonnage" under Article I, § 10, Cl. 3. To support this claim, the court cited *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204 (1870),

where this Court held that the Tonnage Clause forbids States from taxing vessels "as instruments of commerce and navigation" while stating in *dictum* that the Tonnage Clause allows States to tax vessels "*as property, based on a valuation of the same* as property." *Id.* at 213 (emphasis in original). Like the trial court, the state supreme court saw no problems with the City's decision to limit its "personal property" tax to vessels, and brushed aside the Petitioner's contention that this blatant discrimination converted the property tax into a charge for "the privilege of entering, trading in, or lying in" Valdez's ports. In the state supreme court's view, "the legitimacy of the vessel tax does not depend on whether the city chooses to tax other personal property." Pet. App. 20a.

## SUMMARY OF ARGUMENT

The Alaska Supreme Court erred by concluding that the vessel tax was a "fairly apportioned property tax" rather than a thinly disguised charge for the privilege of using Valdez's ports. This Court has long held that the States cannot escape the restrictions in Article I, § 10, Cl. 3 by converting Duties of Tonnage into assessments based on measures other than a vessel's weight or carrying capacity. *Any* requirement that vessels pay tribute for the privilege of using a State's port is still a "duty" on that vessel's "tonnage," even if individual ships pay different *effective tax rates* on their tonnage. That is exactly the regime

that Valdez has established in this case. Its so-called "personal property" tax applies only to vessels that use the Valdez ports, and exempts "all other personal property" from its reach. And the City's port-day apportionment formula destroys any possible relationship between the amount of tax charged to each vessel and the benefits or municipal services, such as police and fire protection, that Valdez provides to valuable property within in its jurisdiction. This is nothing more than an unconstitutional "Duty of Tonnage" masquerading as a property tax.

The Tonnage Clause does allow States to collect a *genuine* personal property tax from ships and vessels in its ports. But such taxes must also apply to other items of personal property in the taxing jurisdiction, and cannot single out vessels that use the State's ports. That is the only way to distinguish a true "personal property" tax from a repackaged "duty of tonnage" that seeks only to extract money from vessels for the privilege of using a State's ports. To hold otherwise would render the Tonnage Clause a dead letter, as States and localities could siphon as much as they can from vessels in their ports without having to tax any other personal property in their jurisdiction. The only constitutional constraint would be that States call this assessment a "property tax" rather than a duty on the vessel.

When States can attempt to evade constitutional constraints through clever legislative draftsmanship, this Court disregards the State's nomenclature and looks solely to the State law's *effects*. In *Apprendi* v.

*New Jersey*, 530 U.S. 466 (2000), for example, this Court refused to allow States to circumvent the constitutional jury right by recharacterizing the elements of crimes as "sentencing factors." Instead, this Court protected the jury right by establishing a bright-line rule, extending the jury right to any fact that had the effect of increasing a defendant's maximum allowable punishment. *Id.* at 494 n.19. So too, here, this Court must disregard the City of Valdez's decision to label this assessment a "personal property tax," and determine whether the effect of the tax is to charge tribute from vessels for the mere privilege of using the City's ports. This Court need not resolve, in this case, the precise extent to which seaboard jurisdictions may establish exemptions to generally applicable property taxes without crossing constitutional boundaries. But there can be no doubt that the Valdez "personal property tax" in this case, which exempts *all* personal property *except* ships and vessels in the City's ports, falls on the "Duty of Tonnage" side of the line.

## ARGUMENT

### I. States Cannot Escape The Duty Of Tonnage Clause By Simply Recalibrating Such Duties As A Function Of The Vessel's Assessed Market Value.

The Tonnage Clause provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. Art. I, § 10, Cl. 3. The

Constitution also prohibits the States from "lay[ing] any Imposts or Duties on Imports or Exports" without congressional consent, unless "absolutely necessary" for executing state inspection laws. U.S. Const. Art. I, § 10, Cl. 2. The Framers added the Tonnage Clause to buttress the Import-Export Clause; without the Tonnage Clause, States could indirectly tax imports and exports by taxing the carrying capacity of the vessels used to transport them.[5] The Tonnage Clause serves this important function regardless of whether the Import-Export Clause applies only to foreign commerce, as this Court held in *Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123 (1869), or whether the Import-Export Clause extends also to interstate commerce, as three Justices concluded in *Camps Newfound/Owatonna,*

[5] See, *e.g., Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265 (1935) ("If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise"); *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 218 (1870) ("[T]he prohibition upon the States against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtless intended by the prohibition on any duty of tonnage"); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824) ("'A duty of tonnage' is as much a tax, as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also"); William Henry Burroughs, *A Treatise on the Law of Taxation* 91 (1877) ("[T]he reason which induced the Framers of the Constitution to withdraw imports and exports from taxation, apply as strongly to the vessels engaged in carrying the goods").

*Inc.* v. *Town of Harrison*, 520 U.S. 564, 609-640 (1997) (Thomas, J., dissenting).

Just as the Tonnage Clause precludes States from evading the Import-Export Clause by taxing a vessel's tonnage, this Court's jurisprudence prohibits States from disguising "duties of tonnage" in the form of other assessments with the same functional effects. As Justice Grier explained in *Norris* v. *City of Boston*, 48 U.S. (7 How.) 283 (1849):

> It is a just and well-settled doctrine established by this court, that a State cannot do that indirectly which she is forbidden by the Constitution to do directly. If she cannot levy a duty or tax from the master or owner of a vessel engaged in commerce graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries.

*Id.* at 458-459 (opinion of Grier, J.).

This Court has consistently followed Justice Grier's approach, refusing to limit the Tonnage Clause to assessments on a ship's weight or carrying capacity. Instead, this Court has held that the Tonnage Clause prohibits other assessments on vessels that differ in nomenclature and form, yet have the same effect of extracting money from ship owners for the mere privilege of entering a State's ports. In *Steamship Co.* v. *Portwardens*, 73 U.S. (6 Wall.) 31

(1867), for example, this Court invalidated a flat 5 dollar assessment that Louisiana imposed on every vessel, regardless of weight or cargo capacity, that arrived in the port of New Orleans. *Id.* at 35. In defending this tax, the State argued that the Tonnage Clause applies only to duties "proportioned to the tonnage of the vessel; that is to say a certain rate or so much per ton." *Id.* at 32. But this Court emphatically rejected that contention and held that the Tonnage Clause prohibits "*any duty on the ship*, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty." *Id.* at 35 (emphasis added).

In the *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204 (1870), this Court again rejected the notion that the Tonnage Clause extends only to assessments on a ship's weight or carrying capacity. It proclaimed that the Tonnage Clause prohibits all "taxes levied by a State upon ships and vessels *as instruments of commerce and navigation*." *Id.* at 213 (emphasis added). See also *id.* at 218 (emphasizing that the Tonnage Clause prohibits "*any duty* on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty") (emphasis in original); *id.* at 214 ("[I]f the States, without the consent of Congress, tax ships or vessels as instruments on commerce, by a tonnage duty, *or indirectly by imposing the tax upon the master or crew*, they assume a jurisdiction which they do not possess, as every such

act falls directly within the prohibition of the Constitution") (emphasis added).

Finally, in *Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577 (1874), this Court considered an ordinance that imposed "levee dues" on steamboats that land or moor in the port of New Orleans. For steamboats in port five days or fewer, these "levee dues" were 10 cents per ton; after the vessel's first five days in port, the dues were 5 dollars per day; and steamboats that arrived and departed more than once per week paid only 7 cents per ton on each trip. *Id.* at 578. So the State apportioned some of this tax according to a vessel's tonnage, and apportioned some of it by the number of days in port. But this Court invalidated *all* of it. Quoting extensively from *Steamship Co.*, this Court reiterated that the Tonnage Clause extends beyond "dut[ies] proportioned to the tonnage of the vessel," and reaches any "contribution claimed for the privilege of arriving and departing from a port of the United States," *id.* at 581. This is so regardless of whether the taxing authority charges by the ton, by the number of days in port, or by some other criterion.

These holdings were not only necessary to prevent the States from evading the Tonnage Clause by recalibrating their duties to some other characteristic of the vessel, they are also the most natural reading of the constitutional text. The Framers did not limit the Tonnage Clause prohibition to "duties *proportionate to a vessel's* tonnage"; they extended it to any "Duty *of* Tonnage." Their choice to use these more

general terms refutes the notion that the clause prohibits only duties that take the form of a fixed charge per ton, or that the drafters intended to establish such an easy roadmap for State evasion. Rather, the clause reflects the recognition that *any* tribute assessed on vessels for the mere privilege of using a State's ports is still a "duty" on that vessel's "tonnage," even if it takes the form of a flat fee, a *per diem* charge, or a tax proportioned to a vessel's market value. The only difference is that some vessels in the port may pay a different *effective tax rate* on their tonnage than others. But it does not make the tax any less of a "duty" on the "tonnage" in that vessel.

Indeed, no one could seriously maintain, on either textual or practical grounds, that a State can escape the Tonnage Clause by imposing a duty on a vessel's masts, or on its passengers, or even on its fair market value, for the mere privilege of using the State's ports. Such efforts can be no more availing than legislatures' attempts to evade other constitutional protections by tweaking the form of their laws. For example, this Court has rejected the notion that States can circumvent the jury right by recharacterizing "elements" of crimes as "sentencing enhancements." See, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). For *both* the Tonnage Clause and the jury right, the constitutional inquiry depends not on matters of form or nomenclature, but on the law's effects. See *Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater

punishment than that authorized by the jury's guilty verdict?"); *Clyde Mallory Lines*, 296 U.S. at 264-265 ("[T]he prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port").

This is not to say that the Tonnage Clause forbids States from imposing *any* tax or charge on the vessels that use its ports. Sometimes a tax on vessels may serve as a legitimate compensatory assessment for services that the State provided, or as a generally applicable property tax, rather than an unconstitutional "duty" on the vessel's "tonnage." But it does require courts to scrutinize the *effects* of these laws, and to invalidate any state or municipal tax that operates to charge vessels for the mere privilege of using a port, without regard to the name or title that the State affixes to the tax. See *Inman S.S. Co.* v. *Tinker*, 94 U.S. 238, 244 (1876) ("[T]he name is immaterial: it is the substance we are to consider").

### A. States May Impose Charges For Services That They Provide To Vessels, But They May Not Charge Vessels For The Mere Privilege Of Using Their Ports.

Whenever this Court has invalidated a tax under the Tonnage Clause, it has been careful to note that

States and localities *may* assess ship owners for the services that these jurisdictions provide to vessels in their ports. In *Steamship Co.*, for example, this Court suggested that the Tonnage Clause would allow States to charge vessels for services provided by portwardens. 73 U.S. (6 Wall.) at 33. But this Court rejected Louisiana's effort to characterize its $5 assessment as compensation for portwardens' services, because state law required this payment to the master and wardens "whether they be called on to perform any service or not." *Id.* at 34.

And in the *State Tonnage Tax Cases*, this Court emphasized that States could tax vessels if such assessments "aid . . . the inspection laws of a State" or "contemplat[e] benefits and advantages to commerce and navigation." 79 U.S. (12 Wall.) at 219. But the tax in that case was "emphatically an act to raise revenue to replenish the treasury of the State and for no other purpose, and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation." *Id.* at 220.

Likewise in *Cannon*, this Court asserted that States may require vessels landing at publicly-owned wharfs or piers to pay a "just compensation for the use of such property." 87 U.S. (20 Wall.) at 582. But the New Orleans levee dues could not be regarded as "just compensation" for using the city's wharves, because they were imposed on all steamboats landing in the city limits, regardless of whether the boats used the city's wharves. *Id.* at 580. See also *id.* at 581 ("[T]he dues here claimed cannot be supported as a

compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi River within the city of New Orleans, for the privilege of so landing or mooring"). See also *Inman S.S. Co.*, 94 U.S. 238, 243 (1876) (condemning a New York tax as an unconstitutional tonnage duty only after concluding that the tax "is not exacted for any services rendered or offered to be rendered").

Indeed, this Court has even upheld direct assessments *on a vessel's tonnage* when they represent reasonable compensation for services provided to vessels. *Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877), upheld a wharfage fee on vessels that land and moor at the city's wharves, even though fees were proportioned to the vessels' tonnage. This Court wrote that "a charge for services rendered or for conveniences provided is in no sense a tax or a duty." *Id.* at 84. It viewed wharfage fees as akin to acts of proprietorship rather than acts of sovereignty, and concluded that they therefore fell outside the prohibition on "*duties* of tonnage." *Id.* at 85. Yet this Court cautioned that such assessments *would* qualify as "a duty" or "a tax" if they were imposed "for the privilege of entering the port Keokuk, or remaining in it, or departing from it." *Id.* at 84. See also *Clyde Mallory Lines*, 296 U.S. at 266 (holding that the Duty of Tonnage Clause "does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel"); *Transp. Co.* v. *Parkersburg*, 107 U.S. 691, 696 (1883) ("[A] duty of

tonnage is a charge for the privilege of entering, or trading or lying in, a port or harbor; wharfage is a charge for the use of a wharf"); *Huse* v. *Glover*, 119 U.S. 543, 550 (1886). Again, the constitutionality depends on the *functional effects* of the assessment, without regard to whether a particular vessel's tax bill is a function of its tonnage or some other characteristic. It must be reasonably related to services that the taxing jurisdiction provided to ship owners, rather than a charge imposed on vessels for the mere privilege of using the jurisdiction's ports.

### B. States May Levy Generally Applicable Personal Property Taxes On Vessels In Their Ports, But The Duty of Tonnage Clause Forbids Assessments Targeted At Vessels As Instrumentalities Of Commerce Or Navigation.

This Court has also allowed States and municipalities to apply generally applicable personal property taxes to vessels owned by their citizens. In *Transp. Co.* v. *Wheeling*, 99 U.S. 273 (1878), this Court rejected a Tonnage Clause challenge to a tax that West Virginia imposed on its citizens' personal property. The tax applied to any personal property registered in the assessors' books,[6] and established a

[6] This Court's opinion in *Wheeling* does not indicate the scope of this category of taxable personal property, but it does note that the personal property tax extended to some of the

(Continued on following page)

uniform annual rate on that property. *Id.* at 277. This Court turned aside the plaintiff-in-error's claim that the property tax violated the Tonnage Clause when applied to vessels; the Court thought it "well settled" that States could tax their citizens' vessels as personal property without violating the Tonnage Clause. *Id.* at 279.

But *Wheeling* holds only that the Tonnage Clause permits a State to impose property taxes that are: (1) Generally applicable to personal property, and (2) Apply only to its citizens' personal property. *Wheeling* never suggested, in holding or *dictum*, that a State could adopt a "personal property" tax levied *exclusively* on ships and vessels entering its ports. Such a view would have been irreconcilable with this Court's holdings in *Steamship Co.*, the *State Tonnage Tax Cases*, and *Cannon*, which forbid *any* assessments imposed on vessels for the mere privilege of using a State's ports. And it would have opened the door for States to shield unconstitutional tonnage duties from constitutional scrutiny by relabeling them as "personal property" taxes that apply only to ships and vessels. Indeed, the *Wheeling* Court anticipated this very possibility, and, citing Burroughs's treatise on taxation, stated that the Tonnage Clause prohibition "*comes into play where [vessels] are not taxed in the same manner as the other property of the citizens*, or

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plaintiff's furniture, as well as to its ships and vessels. See 99 U.S. at 278.

where the tax is imposed upon the vessel as an instrument of commerce, without reference to the value as property." *Id.* at 284 (emphasis added).

Nor did *Wheeling* allow States to tax *non-citizens'* vessels that use the State's ports. The "home-port doctrine" still prevailed at the time of *Wheeling*, which allowed only the domiciliary State to tax movable property. See, *e.g.*, *Hays* v. *Pac. Mail S.S. Co.*, 58 U.S. (17 How.) 596 (1855). Although the home-port doctrine is now defunct, and no longer presents a barrier to States' efforts to tax non-citizens' property, see, *e.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), the *Wheeling* opinion *still* forecloses assessments targeted at vessels as instruments of commerce, rather than to obtain compensation for services, such as police and fire protection, that the State has provided to owners of valuable property within its jurisdiction. See *Wheeling*, 99 U.S. at 283 (emphasizing that vessels may be taxed "only as property and not as vehicles of commerce"); *id.* at 284 ("Decided cases of the kind everywhere deny to the States the power to tax ships as the instruments of commerce").

The *State Tonnage Tax Cases* endorsed this same distinction between a genuine property tax, applicable to all types of property owned by the State's citizens, and an assessment targeted at vessels as "instruments of commerce and navigation." See 79 U.S. (12 Wall.) at 213. In these cases, Alabama had enacted a revenue law that established two tax rates on personal property throughout the State. For

"property generally," the tax was 0.5% of the property's assessed value. But for "steamboats, vessels, and other water crafts plying in the navigable waters of the State," the tax was "$1 per ton of the registered tonnage thereof." See *id.* at 204. This latter category established a dramatically higher tax rate that applied only to steamboats and vessels. As an example, one of the taxpayer's ships was valued at $5000, but could hold 321 tons. At the tax rate that Alabama established for "property generally," the tax would have been $25, but the special tax rate that Alabama imposed on steamboats and vessels left the taxpayer with a bill for $321 – a greater-than-twelvefold increase. See *id.* at 211.

This Court invalidated this vessels-only tax bracket as an unconstitutional "duty of tonnage," and rejected the State's efforts to characterize it as a "property tax." The problem was not simply that Alabama had taxed steamboats and vessels according to their tonnage rather than their assessed value. Rather, Alabama had *targeted* an enhanced tax at ships and vessels acting as instruments of commerce and navigation. Wrote the Court:

> "[T]he tax is . . . a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are 'plying in the navigable waters of the State,' showing to a demonstration that it is as instruments of commerce and not as property that they are

> required to contribute to the revenues of the state."

*Id.* at 217-218.

This holding establishes that so-called "property taxes" on vessels must represent *genuine* property taxes to pass muster under the Tonnage Clause, assessed on the vessel *as property* rather than as an instrument of commerce. See 79 U.S. (12 Wall.) at 213 ("Taxes levied by a State upon ships and vessels owned by the citizens of the State *as property, based on a valuation of the same* as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying *any duty of tonnage*, without the consent of Congress") (emphasis in original). A tax that applies only to ships and vessels as instruments of commerce, and that seeks revenue for the mere privilege of using a State's ports, violates the Tonnage Clause, regardless of whether a State calls it a "property tax," a "duty of tonnage," or "Mary Jane." *Cf. Ring* v. *Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

* * *

States cannot escape the Duty of Tonnage Clause by repackaging duties as other forms of assessments on vessels for the mere privilege of using ports. And this Court has established two bright-line rules that prevent States from disguising tonnage duties in the

form of other assessments that have the same functional effects. First, States may not impose *any* taxes or duties that "operate to impose a charge for the privilege of entering, trading in, or lying in a port," although States may assess charges "for services rendered to and enjoyed by the vessel." *Clyde Mallory Lines*, 296 U.S. at 265-266. A "duty of tonnage" need not be a duty *proportioned to* the vessel's tonnage, but includes any tax on vessels *with tonnage* that requires tribute for the privilege of using a State's ports.

Second, States may not impose taxes on vessels "as instruments of commerce and navigation," *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 213, although they may tax vessels pursuant to a generally applicable property tax, see *Wheeling*, 99 U.S. at 284. Without these safeguards, States would face no meaningful constraints in their efforts to exact money from vessels that use their ports, and the Tonnage Clause would become a toothless relic. Each of these rules requires courts to scrutinize the *effects* of a State's vessel tax, rather than the nomenclature that state officials use to describe it.

## II. The City Of Valdez "Personal Property" Tax Is A Duty Of Tonnage Masquerading As A Property Tax.

When one scrutinizes the effects of the Valdez personal property tax rather than its nomenclature, it becomes obvious that this tax is both a "charge for the

privilege of entering, trading in, or lying in a port," *Clyde Mallory Lines*, 296 U.S. at 265-266, as well as a tax on vessels "as instruments of commerce and navigation," *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 213. This is evident when one considers that Valdez imposes its "personal property" tax only on ships and vessels that use its ports; all other personal property is exempt. What's more, the port-day apportionment formula indicates that Valdez is simply trying to extract money from the vessel owners, without any effort to apportion the assessment according to the amount of services that Valdez might have provided to property owners in its jurisdiction. This so-called "property tax" is a sham, and serves only to exact tribute from vessels for the mere privilege of using the City's ports.

### A. The City Of Valdez Has Violated The Tonnage Clause By Targeting Its Personal Property Tax At Ships And Vessels In Its Ports And Exempting All Other Personal Property From Its Scope.

Ordinance No. 99-17 imposes a "personal property" tax on certain vessels over 95 feet in length. Pet. App. 45a. But it exempts commercial-fishing vessels and "all other personal property" from this exaction. *Id.* at 45a, 48a. The upshot is that Valdez's personal property tax falls exclusively on ships and vessels in its ports, and primarily on oil tankers that transport

Alaska's crude oil exports to out-of-state residents. *Id.* at 40a.[7]

This is almost as blatant an evasion of the Duty of Tonnage Clause as one can imagine: a supposed "personal property" tax that applies only to ships and vessels in a city's ports. The only potential saving grace is that Valdez also taxes real property, including trailers and mobile homes, under a separate provision of the City Code. See Pet. App. 47a-48a (quoting section 3.12.022 of the Valdez City Code). Valdez believes that suffices to defeat the Petitioner's contention that this "personal property" tax is a "Duty of Tonnage" in disguise. See Brief in Opposition at 11. But a State or municipality cannot insulate a vessel tax from judicial scrutiny by the simple expedient of combining it with a tax on real property, or some other small subset of property within its jurisdiction. The Tonnage Clause compels courts to scrutinize taxes on vessels to ensure that they represent a genuine and generally applicable property tax, see *Wheeling*, 99 U.S. at 284, or else a charge for "services rendered to and enjoyed by the vessel," *Clyde Mallory Lines*, 296 U.S. at 265-266, rather than a disguised effort to exact tribute from commercial vessels for the mere privilege of using its ports. Under any standard of review, even rational basis, the Valdez personal-property tax flunks this test. There is no conceivable reason to establish a property-tax

[7] See note 2, *supra*.

regime that taxes only real property *and* vessels in the City's ports except to shift the tax burden on to the out-of-state commercial interests that use Valdez's ports. This is only confirmed by the City's decision to exempt fishing vessels from the tax, which are mostly owned by local commercial interests.

None of this implies that property-tax exemptions are *per se* unconstitutional, as Valdez suggests in its caricature of Petitioner's argument. See Brief in Opposition at 12 n.3. If, for example, a taxing jurisdiction established a generally applicable property tax that exempted property owned by charitable institutions, it is easy to see that such an exemption serves purposes other than a desire to exact tribute from vessels that use that jurisdiction's ports. See, *e.g.*, *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664 (1970). The same would likely be true when a taxing jurisdiction exempts small subsets of real or personal property from a generally applicable property tax. But when a seaboard jurisdiction exempts all forms of personal property *except* vessels in its ports, there can be no doubt that the tax is targeting ships and vessels "as instruments of commerce and navigation" rather than as property, see *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 213 (1870), and effectively becomes a tax on the imports and exports that the vessels transport.

### B. The City Of Valdez Has Violated The Tonnage Clause By Adopting An Apportionment Formula That Bears No Relation To The Benefits And Municipal Services It Provides To Vessel Owners.

Valdez has aggravated the constitutional problems with its vessels-only tax by adopting an apportionment formula that fails to reflect any rational connection between the amount of tax paid and the value of the services that Valdez has provided to the tankers' owners. This is further confirmation that Valdez is extracting money for the mere privilege of using its ports, rather than seeking to compensate itself for protecting the vessel owners' property and providing other services while the vessels are within the City's jurisdiction.

Most of the vessels subject to tax in Valdez are domiciled in other States and spend much of the year on the high seas or in ports outside of Valdez. Yet Valdez fails to apportion its property tax in accordance with the number of days that the tankers spend in the City's ports. Instead, Valdez employs a "port-day" formula, which taxes the vessel for the time it spends in Valdez as a percentage of the total time spent *in all ports* in a given year. Pet. App. 55a-56a. This formula requires a vessel that spends 4 days in a Valdez port, 2 days in another jurisdiction's port, and 359 days on the high seas to pay a *higher* annual tax rate on its assessed value than a vessel that spends 100 days in Valdez, 200 days in other

ports, and 65 days on the high seas. This "port-day formula" upends any connection between the amount of the assessed tax and the public services, such as police and fire protection, that the City provides to the vessel's owners, and defeats any attempt to characterize the assessment as a genuine property tax.

Valdez notes that it provides many services to the oil tankers in its ports, see Brief in Opposition at 1-3, and that is undeniable. But the same, of course, could be said of the States and municipalities that attempted to tax vessels in *Steamship Co.*, the *State Tonnage Tax Cases*, and *Cannon*. The inquiry under the Tonnage Clause is not whether the City of Valdez provides some benefits to the tankers (every port city provides services to vessels in its ports), but whether the tax reflects a charge for the mere privilege of using the city's ports. In this case, the amount of tax imposed bears no relation to the amount of public services that individual tankers consume, depending instead on utterly irrelevant factors such as the number of days a tanker spends on the high seas rather than in other jurisdictions' ports. In light of this "port-day formula," this tax cannot be considered a mere compensatory assessment for services that Valdez provided to the vessels, nor can it be upheld as a genuine personal property tax, as the amount of tax is untethered to the value of the public resources needed to protect the property. It can only be an unconstitutional attempt to evade the Tonnage

Clause by charging vessels for the mere privilege of using the City's ports.

## CONCLUSION

This Court should reverse the Alaska Supreme Court's judgment.

Respectfully submitted,

JONATHAN F. MITCHELL
3301 Fairfax Drive
Arlington, VA 22201
(703) 993-8848

PAUL C. GRACEY, JR.
NICOR INC./TROPICAL SHIPPING
AND CONSTRUCTION CO. LTD.
1844 Ferry Road
Naperville, IL 60563
(630) 388-2750